No. 11593

In the United States Circuit Court of Appeals for the Ninth Circuit

J. GERBER HOOFNEL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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CITATIONS

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OPINION BELOW

The only previous opinion in this case is that of the Tax Court (R. 49–62) which is reported in 7 T. C. 1136.

JURISDICTION

This petition for review involves a deficiency in income tax of the petitioner (hereinafter referred to as the taxpayer) for the year 1943 in the amount of $1,311.01. (R. 63, 64–71.)

On August 31, 1945, the Commissioner of Internal Revenue mailed to the taxpayer a notice of deficiency. (R. 7–10.) Within 90 days thereafter, namely, on September 10, 1945 (R. 2), the taxpayer filed with the Tax Court a petition (R. 4–10) for a redetermination

of the deficiency, pursuant to Section 272 of the Internal Revenue Code. On November 13, 1946, the Tax Court entered its decision, sustaining the deficiency determined by the Commissioner. (R. 63.) Within three months after that decision, namely, on February 10, 1947 (R. 3), the taxpayer filed his petition (R. 64–71) for a review of the decision of the Tax Court, pursuant to the provisions of Sections 1141–1142 of the Internal Revenue Code. By stipulation in writing (R. 63–64) the parties herein have designated this Court as the court for review.

QUESTIONS PRESENTED

1. Was the taxpayer a bona fide resident of a foreign country or countries during the taxable year 1943 and thus entitled, under Section 116 (a) of the Internal Revenue Code as amended by Section 148 of the Revenue Act of 1942, to an exemption for salary received from sources without the United States?

2. Taxpayer boarded a British vessel anchored in New York harbor on June 30, 1942. The vessel did not sail until the morning of July 1, 1942, and the taxpayer landed in the British Isles later in July of 1942. Under these circumstances, was the taxpayer a bona fide nonresident of the United States for more than six months of the year 1942 within the meaning of Section 116 of the Internal Revenue Code prior to its amendment by Section 148 of the Revenue Act of 1942?

STATUTE AND REGULATIONS INVOLVED

The statute and Regulations involved are set forth in the Appendix, *infra,* pp. 12–16.

STATEMENT

The facts as stipulated (R. 11–14) and as found by the Tax Court (R. 51–58) are as follows:

Taxpayer is a single man, a citizen of the United States residing in Los Angeles, California. Taxpayer timely filed income tax returns for the taxable years 1942 and 1943 with the Collector of Internal Revenue for the District of Maryland. (R. 51–52.)

Early in 1942 Lockheed Aircraft Corporation entered into a contract with the United States Government in which the corporation agreed to organize, equip and operate an aircraft depot in Northern Ireland in connection with the war effort. The project was designated by the United States Army as operation "Magnet". In connection with the operation it was necessary for the Lockheed Aircraft Corporation and its subcontractor, Lockheed Overseas Corporation, sometimes hereafter referred to as Lockheed, to employ large numbers of skilled men in the United States and transport them to the British Isles. It was estimated that some 5,400 American citizens at one time or another were employed by Lockheed at the aircraft depot in Northern Ireland. (R. 52.)

From January 1, to June 30, 1942, taxpayer was employed as a secretary by Vega Aircraft Corporation and by Lockheed at Burbank, California. During that time he received a salary amounting to $1,418.59. (R. 52.)

On or about February 18, 1942, taxpayer made out and signed a formal application for overseas employment with Lockheed and in connection with such application signed a contract shortly thereafter with the

corporation in which he agreed to perform services for the company at an aircraft depot to be operated by it in the British Isles. The application which taxpayer signed for employment with Lockheed was headed: "Application For Foreign Service." The application contained the following question (R. 53):

> Are you willing to go to any part of the world?
>
> Yes.
>
> For how long? 1 year. 2 years. Longer X.

Taxpayer in his application for foreign service thus indicated a willingness to serve as an employee of Lockheed overseas for more than two years, if necessary. The contract provided, *inter alia,* as follows (R. 53–55):

> ARTICLE 1. TIME AND DURATION OF EMPLOYMENT.
>
> Contractor employs Employee to render services in connection with said aircraft depot with such duties as reasonably may be assigned to him, and Employee accepts such employment with knowledge of the conditions recited above. Subject to the terms and conditions hereinafter set forth, Employee's employment hereunder shall commence when he reports for duty at a point within the United States to be designated by Contractor, at the time and place designated by Contractor, and shall continue until Novemmer 1, 1942, or such later date as may be agreed upon and thereafter until sixty (60) days after return transportation to the United States is made available by Contractor, it being understood that such return transportation shall be

made available on November 1, 1942, or the later date agreed upon or as soon thereafter as is practicable under the circumstances then existing.

* * * * *

ARTICLE 7. HOUSING, SUBSISTENCE AND MEDICAL SERVICES.

During the time that Employee is employed hereunder and remains at the place or places of his duty outside of the United States, Contractor shall furnish or cause to be furnished, without cost to Employee, such adequate food, lodging, special clothing and equipment, medical, nursing, and hospital services and treatment and recreational facilities as circumstances may reasonably permit.

Employee shall submit prior to departure and from time to time during his employment to such vaccination, inoculation, and/or any other medical, dental, surgical, nursing, and/or hospital treatment, preventative or curative, as the Contractor or other medical staff at the destination or elsewhere may from time to time specify, without expense to Employee.

Contractor may direct the return to the United States of Employee, if in Contractor's judgment Employee's health condition is unfavorable.

* * * * *

ARTICLE 9. TAXES.

Contractor shall either pay or reimburse Employee for any and all taxes lawfully levied or assessed by any foreign Government against Employee with respect to his residence, occupation, salary, or income, provided, however, that Employee shall immediately notify Con-

> tractor in writing of any such levy or assessment and that Employee shall not pay any of such taxes as Contractor may direct him not to pay and that any claim for reimbursement shall be asserted in writing to Contractor within thirty (30) days after such payment, and provided further that Contractor shall save Employee harmless from any monetary loss resulting from or occasioned by Employee's failure to pay such taxes in compliance with instructions or directions given by Contractor.

Pursuant to the terms of his contract, taxpayer on June 30, 1942, boarded the H. M. S. *Maloja,* a vessel of British registry and under a British captain and officers, berthed in New York harbor. Because of the danger of German submarines, Hoofnel was not allowed any contacts with the mainland after he boarded the vessel. The *Maloja,* with taxpayer aboard, sailed from New York harbor early on the morning of July 1, 1942, bound for the British Isles. Taxpayer landed in Liverpool, England. (R. 55.)

Taxpayer was admitted to the British Isles on a visa as an employee of Lockheed. This visa, under British law, had to be put in use within three months from the date it was issued but the time that the holder would be allowed to stay is not mentioned therein. The visa, under British law, would permit him to remain for the purpose for which it was given, as an employee of Lockheed, and if and when Lockheed terminated its work over there, taxpayer would be expected to depart within a reasonable time when transport was available and subject to any extensions

that might be given him by the home office in London or local authorities in Belfast. (R. 55–56.)

After disembarking, taxpayer was first assigned to a small base near Glazebrook, England, for several weeks, after which he was transferred to the main base in Ireland. (R. 56.)

The expiration date of taxpayer's contract was extended by agreement of the parties until May 1, 1943, at which time he entered into a new contract with Lockheed Overseas Corporation. This new contract provided, *inter alia,* as follows (R. 56–57):

> ARTICLE 1. TIME AND DURATION OF EMPLOYMENT.
>
> Contractor employs Employee to render services in connection with said aircraft depot with such duties as reasonably may be assigned to him, and Employee accepts such employment with knowledge of the conditions recited above. The term of Employee's employment hereunder shall * * * continue, subject to the terms and conditions hereinafter set forth, for (i) the duration of the contract between the Government and Lockheed as from time to time extended and for such period after the termination or completion of said contract as Contractor may, in respect of such Employee, deem necessary for the winding up of the operations carried on under said contract after such termination or completion; and (ii) thereafter until return transportation to the United States for such Employee is made available by Contractor or by the Government to Contractor which transportation Contractor shall use its best efforts to obtain as promptly after the end

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> of the period described in the foregoing clause (i) as is practicable under the circumstances then existing; * * *

The taxpayer remained in the employ of Lockheed stationed in Northern Ireland until July 13, 1944, when he returned to the United States. (R. 57.)

Taxpayer received as compensation for personal services rendered to Lockheed in the British Isles and Northern Ireland during the year 1942 the sum of $2,600 and during 1943 the sum of $5,262.50, of which sums 90 per cent was deposited by the corporation to the account of the taxpayer with the Bowling Green Trust Company, Bowling Green, Kentucky, pursuant to Article 2 of his employment contract. (R. 57.)

Taxpayer did not at any time make any application to become a citizen of Northern Ireland, or a British subject. During the taxable year 1943 he was domiciled in the United States and his intentions were to remain in Ireland not longer than the duration of the war or until his employment with Lockheed Overseas Corporation terminated, at which time he intended to return to the United States. He did not pay any income taxes to the Government of Northern Ireland or to the United Kingdom of Great Britain. (R. 57–58.) Taxpayer stated on both his returns for 1942 and 1943 as follows (R. 58):

> Taxpayer claims exemption from Federal Income Tax for the period June 30, 1942, to July 12, 1944, for the reason that during that period he was a resident of the British Isles and North Ireland within the meaning of the Revenue Code and of Sec. 116 thereof and as the term

resident is defined in Regulations 111 Sec. 29.211–2.

Taxpayer embarked on June 30, 1942, on H. M. S. *Maloja* bound for British Isles and Ireland, where he remained a resident until his return to New York City on July 12, 1944.

When he applied to Lockheed for the above employment he intended to and promised them he would remain in their overseas service as long as their contract with the U. S. Army required for the duration of the war and as long thereafter as needed: He had no definite intentions as to his stay overseas other than as above stated; he did not know or plan when he might be able to return because of the uncertainty of the duration of the war.

The Tax Court concluding (1) that the taxpayer during the taxable year 1943 was not "a bona fide resident of a foreign country or countries" within the meaning of Section 116 (a) of the Internal Revenue Code as amended by Section 148 of the Revenue Act of 1942, and (2) that the taxpayer was not a bona fide nonresident of the United States for more than six months during the taxable year 1942 and that the amounts received by him as compensation sources within the British Isles was includible in ~~the~~ income for 1942, determined the deficiency in income tax which is here in controversy.

ARGUMENT

The first question presented in this case is the same question which is presented to this Court in *Downs* v. *Commissioner,* No. 11578, and is presented upon indistinguishable facts. For the sake of convenience

and brevity the respondent adopts and incorporates herein by reference the argument made on behalf of the respondent in his brief in *Downs* v. *Commissioner, supra.*

Upon the second question, the taxpayer (Br. 16) argues that notwithstanding the taxpayer's physical presence within the United States for more than six months during the taxable year 1942, he should nevertheless be considered to have been a bona fide nonresident of the United States for more than six months of the taxable year 1942. This contention is based upon the single consideration that the taxpayer boarded an English vessel lying at anchor in New York harbor, but destined for the British Isles, on June 30. It is suggested that the taxpayer's physical presence within the United States should be disregarded and that the taxpayer should be deemed to have departed from the United States at the time of his boarding of the vessel. It is contended that because of the menace of German submarines and the consequent security necessities, the ordinary rules of the port were not being observed and for that reason the taxpayer should be deemed to have departed the United States at the time of his boarding the vessel. No authority is cited as supporting this view and we suggest that there is none. Congress in enacting Section 116 of the Internal Revenue Code laid down an inflexible basis for the granting of the exemption therein contained, i. e., six months' physical absence from the United States. The taxpayer did not meet this test for the taxable year 1942 and, while the

taxpayer's *ad hominem* argument on the point has some appeal to the equities of the situation, the decision of the Tax Court on this point represents a proper application of the statute.

CONCLUSION

The decision of the Tax Court should be affirmed.
Respectfully submitted.

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SEWALL KEY,
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AUGUST, 1947.

APPENDIX

Internal Revenue Code:

SEC. 116 [as amended by the Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 148 (a)]. EXCLUSIONS FROM GROSS INCOME.

In addition to the items specified in section 22 (b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) *Earned Income From Sources Without the United States.*—

(1) *Foreign Resident for Entire Taxable Year.*—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) ~~in~~ such amounts would constitute earned income as defined in section 25 (a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

(2) *Taxable Year of Change of Residence to United States.*—In the case of an individual citizen of the United States, who has been a bona fide resident of a foreign country or countries for a period of at least two years before the date on which he changes his residence from such country to the United States, amounts received from sources without the United States (except amounts paid by the United States or any

agency thereof), which are attributable to that part of such period of foreign residence before such date, if such amounts would constitute earned income as defined in section 25 (a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

* * * * *

(26 U. S. C. 1940 ed., Sec. 116.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.116–1.[6] *Earned Income From Sources Without the United States.*—For taxable years beginning after December 31, 1942, there is excluded from gross income earned income in the case of an individual citizen of the United States provided the following conditions are met by the taxpayer claiming such exclusion from his gross income: (a) It is established to the satisfaction of the Commissioner that the taxpayer has been a bona fide resident of a foreign country or countries throughout the entire taxable year; (b) such income is from sources without the United States; (c) the income constitutes earned income as defined in section 25 (a) if received from sources within the United States; and (d) such income does not represent amounts paid by the United States or any agency or instrumentality thereof. Hence, a citizen of the United States taking up residence without the United States in the course of the taxable year is not entitled to such exemption for such taxable year. However, once bona fide residence in a foreign coun-

[6] This section was amended by T. D. 5373, 1944 Cum. Bull. 143, in respects not material to the instant case.

try or countries has been established, temporary absence therefrom in the United States on vacation or business trips will not necessarily deprive such individual of his status as a bona fide resident of a foreign country. Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principles of sections 29.211–2, 29.211–3, 29.211–4, and 29.211–5 relating to what constitutes residence or nonresidence, as the case may be, in the United States in the case of an alien individual.

* * * * *

SEC. 29.211–2. *Definition.*—A "nonresident alien individual" means an individual—

(a) Whose residence is not within the United States;

(b) Who is not a citizen of the United States. The term includes a nonresident alien fiduciary.

An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose

stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

* * * * *

SEC. 29.211–4. *Proof of Residence of Alien.*— The following rules of evidence shall govern in determining whether or not an alien within the United States has acquired residence therein within the meaning of chapter 1. An alien, by reason of his alienage, is presumed to be a nonresident alien. Such presumption may be overcome—

(1) In the case of an alien who presents himself for determination of tax liability prior to departure for his native country, by (a) proof that the alien, at least six months prior to the date he so presents himself, has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (b) proof that the alien, at least six months prior to the date he so presents himself, has filed Form 1078 or its equivalent, or (c) proof of acts and statements of the alien showing a definite intention to acquire residence in the United States or showing that his stay in the United States has been of such an extended nature as to constitute him a resident;

(2) In other cases by (a) proof that the alien has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (b) proof that the alien has filed Form 1078 or its equivalent, or (c) proof of acts and statements of an alien showing a definite intention to acquire residence in the United States or showing that his stay in the United States has been of such an extended nature as to constitute him a resident.

In any case in which an alien seeks to overcome the presumption of nonresidence under

(1) (c) or (2) (c), if the internal-revenue officer who examines the alien is in doubt as to the facts, such officer may, to assist him in determining the facts, require an affidavit or affidavits setting forth the facts relied upon, executed by some credible person or persons, other than the alien and members of his family, who have known the alien at least six months prior to the date of execution of the affidavit or affidavits.

SEC. 29.211–5. *Loss of Residence by Alien.*— An alien who has acquired residence in the United States retains his status as a resident until he abandons the same and actually departs from the United States. An intention to change his residence does not change his status as a resident alien to that of a nonresident alien. Thus, an alien who has acquired a residence in the United States is taxable as a resident for the remainder of his stay in the United States.

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